

Doorwerking van de beginselen van behoorlijke rechtspleging in de bestuurlijke voorprocedures

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Summary

The applicability of principles of procedural due process on preliminary administrative proceedings

This book addresses the question of whether, and if so, to what extent, the principles of procedural due process are applicable in the course of preliminary administrative proceedings. In the Dutch system of administrative judicial protection an interested party generally has to follow a preliminary administrative procedure before lodging an appeal with an administrative court. In most cases this preliminary procedure takes the form of an objection procedure with the administrative authority which took the contested decision ("*bezwaarschriftprocedure*"). Another possible preliminary procedure is lodging an administrative appeal to a different administrative authority than the one which took the contested decision ("*administratief beroep*").

Different procedures are governed by different principles. Principles of procedural due process are addressed to courts and thus apply to the administration of justice, whereas the principles of proper administration apply to the preliminary administrative proceedings. However, being a part of the system of judicial protection, the preliminary administrative procedures resemble administrative court procedures. In addition, one principle of procedural due process already applies directly to the preliminary administrative procedures.

The book is divided into three parts. Part I deals with the first part of the central research question: which principles of procedural due process can be distinguished? Part II focuses on the preliminary administrative procedures. In Part II the question of which requirements must be complied with and to what extent those requirements are influenced by principles of procedural due process is answered. Finally, Part III offers the main findings.

Part I

Part I starts with the scope of principles of procedural due process. Here it is argued that the scope is not limited to the administration of justice by an independent court (Chapters 1 and 2). Principles of procedural due process can influence other procedures in various ways. This influence needs to be established separately for each principle and for each procedure.

Chapter 3 of Part I deals with the question of what the actual legal meaning of principles of procedural due process is. The principles of procedural due process are considered to be legal norms which serve as grounds for review of the actions and judgments of the courts. Violation of these principles is unlawful and will, in principle, lead to the annulment of the judgment. However, principles generally are abstract legal norms which must be made concrete by the courts (or by the legislator). In doing so, the

courts (or the legislator) enjoy a certain degree of discretion. As a consequence of this discretion, there are various ways in which these principles can be made concrete. In particular, two types of concrete requirements, which can be deduced from abstract legal norms, can be distinguished: essential requirements and requirements of lesser importance. Violation of essential requirements automatically entails the violation of the underlying principle and therefore leads to legal consequences, whereas a breach of less essential requirements does not necessarily have legal consequences.

Chapter 4 of Part I studies the legal foundations of the principles of procedural due process. It is established that Article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) has a strong influence on the principles of procedural due process which exist at a national level. In general, therefore, less attention is devoted to the development of national unwritten principles of procedural due process. Furthermore, it is concluded that administrative courts make (too) little use of their power to review *ex officio* whether or not principles of procedural due process are complied with. The power to complement *ex officio* the grounds for appeal is used more generously by administrative courts. Next, Chapter 4 discusses the principles of procedural due process. These are: the impartiality principle, the principle of a fair hearing, the publicity principle, the principle that reasons for the decision be given, and the reasonable time principle. In conclusion another principle, which has gained increasing importance in recent years under the influence of the ECHR and European Union law is analyzed: the principle of effective judicial protection. With regard to purely national disputes, this principle is still under development.

The principles of procedural due process can be divided into two categories; principles with internal and external effect. Principles with internal effect primarily aim at safeguarding the interests of the parties to the procedure, whereas principles with external effect have as their primary goal to safeguard interests which fall outside the scope of a procedure and to maintain public confidence in the administration of justice. The assumption is put forward that principles with internal effect can have a greater influence on preliminary administrative procedures than principles with external effect. The validity of this assumption is tested in Part II and III.

Finally, Chapter 5 of Part I deals with the principles of procedural due process in EU law. The European Court of Justice considers these principles general principles of EU law which must be respected. The scope of these EU principles is not limited to court procedures. Some of them apply in the course of procedures before the administrative authorities as well. The general principles of EU law influence the preliminary administrative procedures through the national principles of proper administration. The interpretation of these general principles of EU law hardly differs from the interpretation of the national principles or the interpretation of Article 6 ECHR.

Part II

The second part of the book studies the preliminary administrative procedures and the requirements with which they must comply. In the first three chapters of Part II the study is limited to two preliminary administrative procedures, the objection procedure (“*bezwaarschriftprocedure*”) and the administrative appeal (“*administratief beroep*”). The functions of these procedures and the scope of review are studied in the fourth chapter of Part II. The analysis in Chapter 4 shows that judicial review on the one hand, and reconsideration by the administrative authorities on the other hand, differ to a lesser extent than generally assumed. The objection procedure, for example, has a function both with regard to judicial protection and with regard to extended decision-making. These two functions do not conflict. Preliminary administrative procedures bear more resemblance to judicial review than generally assumed. Therefore, there seems to be no reason to conclude that the existing differences between judicial review and preliminary administrative procedures should lead to the applicability of different requirements of procedural due process.

Chapter 5 of Part II further looks into five principles of procedural due process and their influence on the preliminary administrative procedures. Each principle is analysed separately. The following observations may be mentioned here on these principles.

The fair hearing principle has not (yet) been recognized by the administrative courts as a principle of proper administration. The equivalent principle of procedural due process is not directly applicable on the preliminary procedures. Nonetheless, the administrative courts deduce various concrete requirements from the principle of procedural due process. This is true, for example, for the right to be informed and to have access to relevant files, the right to be heard when new facts or circumstances which may have considerable relevance to the decision arise, and the right to submit documents. Moreover, there are several concrete requirements with a similar function and meaning as the requirements applying to court procedures. Sometimes the foundation for these requirements is however found in a principle of proper administration, the so-called principle of due care. Even though the administrative courts have explicitly stated that the requirement of equality of arms is of no relevance to preliminary administrative procedures, some requirements which apply to these procedures in substance link up with the equality of arms-requirement. The influence of the fair hearing principle on the preliminary administrative procedures is thus somewhat ambiguous.

The impartiality principle which applies to court procedures has a counterpart in administrative procedures: the prohibition of partiality or prejudice, which is a separately recognized principle of proper administration. Although this principle has the same function for the administration as for the administrative courts, the concrete requirements

which are derived from it are slightly different. The various tests under the principle of procedural due process are similar to the tests applied by the courts under the principle of proper administration. Some (implicit) influence of the principle of procedural due process can be observed here.

The publicity principle is neither directly applicable to the preliminary administrative procedures, nor has any equivalent principle of proper administration been recognized. There are no other principles from which publicity requirements can be derived. Nevertheless, requirements concerning a public hearing in preliminary administrative procedures do exist. Requirements concerning access of the public to the decisions of the administrative authorities however do not exist. Therefore, no explicit influence of the principle of procedural due process can be established.

The principle to state reasons for the decision of an administrative authority is a principle of proper administration. This principle has the same functions as its counterpart principle of procedural due process. Both principles consist of a formal and a substantive part. However, the concrete requirements which can be deduced from the principles differ slightly. The principle of proper administration is tailored to the specific nature of the administrative decision-making process. The influence of the principle of procedural due process therefore seems to be limited and implicit.

The reasonable time principle applies directly to the preliminary administrative procedures. The influence of this principle is however limited and accessory, in the sense that the administrative courts refuse to apply this principle when the preliminary administrative procedure is not followed by an appeal to the court. This principle has the same function in the context of preliminary administrative procedure as in court procedures. It has been established that a separate, non-accessory, principle applicable to the preliminary administrative procedures has been slowly developing. From the point of view of legal certainty for interested parties in administrative procedures this may be called a welcome development.

Part III

Finally, concluding remarks are offered in Part III. After an introduction in Chapter 1, Chapter 2 offers an answer to the main research question (“to what extent are principles of procedural due process applicable to the objection procedure and administrative appeal?”). In light of this, Chapter 2 lists and categorizes the principles of procedural due process and their influence on the requirements for preliminary administrative procedures. These principles will be shortly discussed here, listed gradually from strong influence towards no (visible) influence.

The research shows that the strongest influence can be observed with regard to the principles which are directly applicable. This means that the administrative courts apply the principle to the preliminary administrative procedures and they review whether or not the procedure is in compliance with this principle. If the courts establish a violation of the principle, this

will have legal consequences. This is the case only for the reasonable time principle.

The principles which are applied indirectly, but which are nonetheless referred to explicitly by the courts, fall within another category. The courts do not apply these principles directly to preliminary administrative procedures. The courts rather explicitly deduce several concrete requirements from principles of procedural due process. These concrete requirements have the same function as principles of procedural due process. Violation of concrete requirements leads to legal consequences. Principles of this second category are: the right to be informed and to access the file, the right to submit documents, and the right to be heard when new facts or circumstances arise which may have considerable relevance to the decision.

A third category is constituted by principles which have an implicit influence. Even though administrative courts do not explicitly refer to these principles, the concrete requirements applicable to preliminary administrative procedures can be deduced from them. Furthermore, administrative courts may employ the same criteria as those which apply to court proceedings. Another possibility is that the applicable requirements have the same functions as the requirements for court proceedings. The requirement of a public hearing, which is part of the publicity principle, falls into this category. The same is true for the right to be heard and the requirement of equality of arms. However, the foundation of these requirements is in some cases the principle of due care, which is a principle of proper administration. The impartiality principle and the principle to state reasons can also be classified under this category. These principles have counterpart principles of proper administration with the same content and function.

A fourth, and last, category is formed by principles with regard to which no influence can be established. Principles which fall into this category are, for example, the publicity principle, as far as it concerns public access to the decisions of administrative authorities, and the requirement of independence.

Furthermore, Chapter 2 of Part III addresses the question of whether or not the internal or external effect and the absence or existence of equivalent principles of proper administration are relevant. The analysis shows that the existence of an equivalent principle of proper administration and the internal or external effect of a principle can be of significance to its influence on preliminary administrative procedures. Principles with internal effect and without a counterpart principle of proper administration seem to have the strongest influence on the preliminary administrative procedures.

Chapter 3 of Part III deals with the attitude of the administrative courts towards the principles of procedural due process. Due to formal reasons the applicability of those principles to preliminary administrative

procedures is sometimes denied by the courts. This approach may be considered somewhat formalistic, since, from a more substantive point of view, similar requirements with similar functions apply to these procedures. In general, the courts make little use of their power to examine *ex officio* the conformity of procedures with the principles of procedural due process. The power to complement *ex officio* the legal grounds of appeal is used more generously.

Chapter 4 of Part III discusses the relationship between principles of procedural due process and principles of proper administration. Both categories of principles have common roots. The analysis shows that principles of both categories overlap as regards the preliminary administrative procedures. Some principles of procedural due process have counterpart principles of proper administration. Where this is the case, the influence of the principle of procedural due process on the preliminary administrative procedures seems limited. The interpretation and employment of both categories of principles seem to grow towards one another in the preliminary administrative procedures. Therefore, the acknowledgement of a single category of principles, for instance principles of proper procedure, which apply to all procedures which are part of the administrative system of judicial protection, seems legitimate.

Chapter 5 of Part III offers some final remarks. It is argued that more attention should be paid to the coherence between preliminary administrative procedures on the one hand, and administrative court procedures and the applicable procedural requirements on the other. Also the development of national safeguards and principles of procedural due process deserves more attention. Furthermore, it is argued that the administrative courts should be more clear and consistent about the consequences of violations of procedural safeguards. In conclusion, the need for an adequate balance between speediness and effectiveness on the one hand, and due care and process on the other, is emphasized.